LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JUN 13 1962
JOHN F. DAVIS, CLERK

No. [illegible]/20

In the Supreme Court of the United States

OCTOBER TERM, 1962

TREADWELL CONSTRUCTION COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ARCHIBALD COX,
Solicitor General,
WILLIAM H. ORRICK, JR.,
Assistant Attorney General,
ALAN S. ROSENTHAL,
JERRY G. STRACH,
Attorneys,
Department of Justice,
Washington 25, D.C.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	3
Argument	4
Conclusion	9

CITATIONS

Cases:

American Mutual Liability Ins. Co. v. *Matthews*, 182 F. 2d 322 — 6

Baird v. *John McShain, Inc.*, 108 F. Supp. 553 — 6

Brown v. *American-Hawaiian SS Co.*, 211 F. 2d 16 — 6

Coates v. *Potomac Elec. Power Co.*, 95 F. Supp. 779 — 6

Crawford v. *Pope & Talbot*, 206 F. 2d 784 — 6

Johnson v. *United States*, 79 F. Supp. 448 — 6

Liberty Mut. Ins. Co. v. *Vallendingham*, 94 F. Supp. 17 — 6

Lo Bue v. *United States*, 188 F. 2d 800 — 6

Standard Wholesale Phosphate & Acid Works, Inc. v. *Ruckert Terminal Corp.*, 193 Md. 20, 65 A. 2d 304 — 6

United States v. *The S. S. Washington*, 172 F. Supp. 905, affirmed *sub nom. United States* v. *Texas Co.*, 272 F. 2d 711 — 8

United States v. *Weyerhaeuser Steamship Company*, 294 F. 2d 179 — 7, 8

Weyerhaeuser Steamship Company v. *United States*, No. 674, October Term 1961 — 4

642747—62

Statutes:
Federal Employees' Compensation Act (Act of September 7, 1916, 39 Stat. 742, as amended, 5 U.S.C. 751, *et seq.*):
Page
Section 1(a) (5 U.S.C. 751(a)) 2
Section 7(b) (5 U.S.C. 757(b)) 2-3, 4, 5, 7, 8
Longshoremen's and Harbor Workers' Act, Section 5, 33 U.S.C. 905 5
Public Vessels Act, 46 U.S.C. 781, *et seq.* 7
Miscellaneous:
53 A.L.R. 2d 977 6
2 Larson, *Workmen's Compensation Law*, §76.21 6
Rule of the United States Supreme Court, Rule 21 3

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 971

TREADWELL CONSTRUCTION COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The oral opinion of the United States District Court for the Western District of Pennsylvania (Pet. App. 1a–18a) is not reported. The opinion of the United States Court of Appeals for the Third Circuit (Pet App. 19a–24a) is reported at 299 F. 2d 789.

JURISDICTION

The judgment of the Court of Appeals was entered on February 15, 1962. The petition for a writ of certiorari was filed on May 15, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a third party who has been found liable for negligence to a government employee injured in the course of his employment may recover contribution from the United States as a joint tortfeasor despite the limitation of governmental liability in the Federal Employees' Compensation Act.

STATUTES INVOLVED

The Federal Employees' Compensation Act (Act of September 7, 1916, 39 Stat. 742, as amended, 5 U.S.C. 751, *et seq.*) provides in pertinent part:

> Section 1(a) [5 U.S.C. 751(a)]—The United States shall pay compensation as hereinafter specified for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty, but no compensation shall be paid if the injury or death is caused by the willful misconduct of the employee or by the employee's intention to bring about the injury or death of himself or of another, or if intoxication of the injured employee is the proximate cause of the injury or death.
>
> * * * * *
>
> Section 7(b) [added by Section 201 of the Act of October 14, 1949, 63 Stat. 861, 5 U.S.C. 757(b)]—The liability of the United States or any of its instrumentalities under this Act or any extension thereof with respect to the injury or death of an employee shall be exclusive, and in place of all other liability of the United States or such instrumentality to the employee, his legal representative, spouse, dependents, next of kin, and anyone otherwise entitled to recover

damages from the United States or such instrumentality, on account of such injury or death, in any direct judicial proceedings in a civil action or in admiralty, or by proceedings, whether administrative or judicial, under any other workmen's compensation law or under any Federal tort liability statute * * *.

STATEMENT

Joseph Drake, then a civilian employee of the Ordnance Department of the United States Army, was injured while engaged in performing his duties as an artillery assembler at the Watertown Arsenal in the State of Massachusetts. Drake brought suit against the Treadwell Construction Company, petitioner here, alleging that his injury was caused by Treadwell's negligence. Treadwell impleaded the United States as a third party defendant, seeking contribution or indemnity, on the ground that negligence of employees of the United States was a contributing cause of Drake's injuries (R. 4–5).[1]

After trial, the district court held Treadwell liable to Drake (Pet. App. 1a–5a) and entered judgment in the amount of $180,000 (Pet. App. 18a). On Treadwell's third party claim against the United States, the court found that government employees had committed three separate acts of negligence which contributed to Drake's injuries, and that the United States was liable to Treadwell for any amount Treadwell paid to Drake in excess of the sum of

[1] All record references are to the Appendix to the Government's brief submitted in the Court of Appeals and filed here pursuant to Rule 21 of this Court.

$90,000 (Pet. App. 18a). On the government's appeal,[2] the Court of Appeals reversed, remanding the cause for dismissal of the third party claim for lack of jurisdiction (Pet. App. 24a). The court rested its decision on 5 U.S.C. 757(b), *supra*, pp. 2–3, which it held (Pet. App. 21a):

> * * * withdraws whatever consent the Tort Claims Act, considered alone, would otherwise give to the imposition of tort liability upon the United States on account of the injury of an employee covered by the Compensation Act * * *.

ARGUMENT

The court below has determined that the United States may not be held liable for contribution as a joint tortfeasor where the injured person was a government employee covered by the Federal Employees' Compensation Act. This determination was plainly required by the explicit terms of the exclusivity provisions of that Act and is consistent with a uniform line of decisions interpreting the similar provisions of the Longshoremen's and Harbor Workers' Act. Moreover, the recent grant of certiorari to the Ninth Circuit in *Weyerhaeuser Steamship Co.* v. *United States*, No. 674, this Term, does not support petitioner's contention that review by this Court is

---

[1] Treadwell did not appeal from the judgment entered in favor of Drake.

[2] With respect to petitioner's alternative claim for indemnity on a theory of implied contract, the Court of Appeals held that, since the amount of the claim exceeded $10,000, it was cognizable, if at all, in the Court of Claims (Pet. 24a). Petitioner does not challenge this holding in this Court.

warranted in the present case. The petition should therefore be denied.

1. On its face, Section 7(b) of the Federal Employees' Compensation Act, *supra*, pp. 2–3, limits the liability of the United States with respect to the injury or death of one of its employees to the compensation payable under that Act. It is significant that this provision does not purport merely to limit the remedy of a person who might have standing to sue the United States on behalf of the injured party, but explicitly makes the liability of the United States under the Act "exclusive, and in place, of all other liability of the United States * * * to the employee * * * and anyone otherwise entitled to recover damages from the United States * * * on account of such injury * * * by proceedings * * * under any Federal tort liability statute."

There can be no doubt that petitioner's action seeks to "recover damages from the United States" damages which petitioner suffered "on account of such injury" to the original plaintiff, Drake. In all significant respects, therefore, petitioner's action against the United States fits precisely within the explicit terms of the exclusivity provision of the Federal Employees' Compensation Act.

2. Additional support for the decision of the court below is found in cases arising under Section 5 of the Longshoremen's and Harbor Workers' Act, 33 U.S.C. 905, which is virtually identical to Section 7(b) of the Federal Employees' Compensation Act.[4] These cases

[4] Section 5 of the Longshoremen's Act provides in pertinent part that the "liability of an employer [for compensation] shall

have uniformly denied recovery against the employer in circumstances akin to those present here on the ground that a third party tortfeasor's claim against an employer for contribution is barred by Section 5.[5] The decisions point out that the employer surrenders his right to utilize common law defenses and in return gains an absolute, but limited, liability to his injured employee in the place of possible liability without limitation. As succinctly put by the Second Circuit in *American Mutual Liability Ins. Co.* v. *Matthews*, *supra*, 182 F. 2d at 324:

> To impose a non-contractual duty of contribution on the employer is *pro tanto* to deprive him of the immunity which the statute grants him in exchange for his absolute, though limited, liability to secure compensation to his employees.

3. The grant of certiorari by this Court on March 5, 1962 in *Weyerhaeuser Steamship Company* v. *United States*, No. 674, this Term, furnishes no support for

---

be exclusive and in place of all other liability * * * to the employee * * * and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death * * *."

[5] See *Brown* v. *American-Hawaiian SS Co.*, 211 F. 2d 16 (C.A. 3); *Crawford* v. *Pope & Talbot*, 206 F. 2d 784 (C.A. 3); *Lo Bue* v. *United States*, 188 F. 2d 800 (C.A. 2); *American Mutual Liability Ins. Co.* v. *Matthews*, 182 F. 2d 322 (C.A. 2); *Baird* v. *John McShain, Inc.*, 108 F. Supp. 553 (D.D.C.); *Coates* v. *Potomac Elec. Power Co.*, 95 F. Supp. 779 (D.D.C.); *Liberty Mut. Ins. Co.* v. *Vallendingham*, 94 F. Supp. 17 (D. D.C.); *Johnson* v. *United States*, 79 F. Supp. 448 (D. Ore.); *Standard Wholesale Phosphate & Acid Works, Inc.* v. *Ruckert Terminal Corp.*, 193 Md. 20, 65 A. 2d 304; and see 2 Larson, *Workmen's Compensation Law*, § 76.21; 53 A.L.R. 2d 977.

the contention (Pet. 5) that similar action is required here. The same question is not involved in both cases. Although, as the Third Circuit noted (Pet. App. 22a), the decision of the Ninth Circuit in *Weyerhaeuser* (294 F. 2d 179) lends strong support to the result reached in this case, there is a significant distinction.

In *Weyerhaeuser*, a federal employee was injured in a collision between a government vessel and a private vessel which resulted from mutual fault. The owner of the latter made a settlement with the employee and then claimed contribution from the United States. The Ninth Circuit expressly recognized the maritime rule requiring strict apportionment of all damages suffered by the parties to a collision caused by mutual fault. It held, however, that the exclusivity provisions of Section 7(b) of the Federal Employees' Compensation Act qualified the waiver of immunity contained in the Public Vessels Act, 46 U.S.C. 781, *et seq.*, and precluded application of the mutual fault collision rule to a contribution claim against the United States based upon an injury to a federal employee.

While we believe the *Weyerhaeuser* decision to be correct, it was presumably the question of the effect of the maritime divided damages doctrine upon Section 7(b) which led to the grant of certiorari. The petition for certiorari was grounded upon the failure of the

Ninth Circuit to apply that doctrine[*] and asserted, *inter alia*, a conflict with *United States* v. *The S.S. Washington*, 172 F. Supp. 905 (E.D. Va.), affirmed *sub nom. United States* v. *Texas Co.*, 272 F. 2d 711 (C.A. 4), which likewise arose out of a collision between a government and a private vessel.

In the present case no such conflict is, or could be, asserted. As the Ninth Circuit stressed in *Weyerhaeuser*, 294 F. 2d at 184, a suit based upon the admiralty rule of divided damages is unlike a claim for contribution from a joint tortfeasor in that it seeks enforcement of "* * * an independent cause of action not founded upon the injured employee's right but founded upon the employer's breach of a duty *to other shipowners* to exercise care in navigation. * * *" (Emphasis in the original.) The theory of a statute requiring contribution among joint tortfeasors is entirely different. The two wrongdoers owe no duty to each other. They are simply required to share the costs of the violations of the duties owed by each to the injured party. There is thus no rule comparable to that involved in *Weyerhaeuser*, which can be offered by petitioner in justification of its endeavor to avoid the force of the express congressional mandate in Section 7(b) that governmental liability under the Federal Employees' Compensation Act "shall be exclusive, and in place of" all other liability to any one

[*] As stated in the *Weyerhaeuser* petition (p. 9):

"The opinion of the Court of Appeals should be reviewed by this Court to determine whether Congress intended to repeal rights of third parties against the Government in mutual fault collisions, in spite of the failure of the words of Section 757(b) to so provide."

by reason of the injury to the employee. And, as we have seen, the like exclusivity provisions of the Longshoremen's Act consistently have been given effect in similar circumstances.[7]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.
WILLIAM H. ORRICK, JR.,
Assistant Attorney General.
ALAN S. ROSENTHAL,
JERRY C. STRAUS,
Attorneys.

JUNE 1962.

[7] In the Court of Appeals, the Government also urged that the critical findings of the district court concerning the negligence of the United States were clearly erroneous. In its disposition of the case, the Court of Appeals did not reach that question. In the event that certiorari is granted, the United States reserves the right to renew the contention as an alternative basis for affirmance.

U. S. GOVERNMENT PRINTING OFFICE: 1962